APPELLANT'S BRIEF

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12653

OAKLAND DOCK AND WAREHOUSE COMPANY,
a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, GRANTING AN INJUNCTION
HON. HERBERT W. ERSKINE, *Judge*

WM. H. NEBLETT,
615 Latham Square Bldg.,
Oakland, Cal.,
Attorney for Appellant.

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This is an appeal from an interlocutory order of the United States District Court for the Northern District of California, Southern Division, granting a temporary injunction *pendente lite* (R. 83 and 97).

JURISDICTIONAL STATEMENT

A complaint was filed June 8, 1950, in the District Court by the United States, plaintiff, against appellant, Oakland Dock and Warehouse Company, a California corporation, defendant (R. 2), alleging damages for the sale by appellant "without the written consent of the Secretary of the Navy" of certain machinery, machine tools and equipment purchased by appellant from the Government June 1, 1949, alleged in the complaint to be subject to a national security clause. The complaint also prayed for a temporary and permanent injunction. The national security clause alleged in

the complaint was authorized by the National Industrial Reserve Act of 1948, Public Law 883, 80th Congress, approved July 2, 1948 (50 USCA, Sections 451-462). The Act is quoted in full in Appendix A to this Brief.

A preliminary restraining order was issued on the complaint and the affidavit of a Navy employee. Appellant was directed to appear and show cause at the time fixed in the restraining order (R. 34) why it should not be enjoined during the pendency of the action from selling any more of its machinery, machine tools and equipment "without the written consent of the Secretary of the Navy".

The complaint alleged (R. 2) that the District Court had jurisdiction of the action pursuant to Title 28 USCA, Section 1345.

Appellant opposed the order to show cause for a temporary injunction by motion to dismiss the complaint (R. 36-39), answer (R. 34-35) and counter affidavit (R. 40-81), and by evidence introduced on its behalf. The order to show cause came on for hearing June 16, 1950, at which time the parties presented their pleadings and affidavits, together with oral and written evidence (R. 100-394). The lower court took the matter under submission, June 22 (R. 394), and on July 13 (R. 83-85) granted a temporary injunction enjoining appellant from further sales of its machinery, machine tools and equipment during the pendency of the action "without the written consent of the Secretary of the Navy". Appellant perfected its appeal July 17, 1950 (R. 85-90). This court has jurisdiction of the appeal under Title 28 USCA, Section 1292(1).

STATEMENT OF THE CASE *

In 1940-41 (R. 207-214 and 221) the Government condemned some 52 acres of land on the Oakland Estuary, Oakland, California. About the same time Moore Drydock Company, an old and long established shipbuilding company at

* Italics ours unless otherwise indicated.

Oakland, leased from Western Pacific Railroad Company approximately 45 acres of land adjoining the easterly side of the 52 acres. The Government built a shipyard on the two parcels. The ways were put on the Western Pacific leased land; the outfitting part of the yard, on the 52-acre Government-owned section. From 1941 to the end of the war, Moore Drydock Company, under a contract with the Maritime Commission, operated both the leased and Government-owned sections of the shipyard as one shipbuilding plant. In 1946 the shipyard was declared surplus and turned over to the War Assets Administration for disposal under the Surplus Property Act of 1944 (50 USCA, War Appendix, Sections 1611-1646). Moore Drydock Company assigned the Western Pacific lease to War Assets Administration.

Before and after July 2, 1948, the effective date of the National Industrial Reserve Act of 1948, War Assets Administration made numerous efforts to sell the whole yard but was unable to do so because no purchaser appeared who was willing to assume the restoration provisions contained in the Western Pacific lease (R. 360, Dft's. Exhibit F). Early in 1949 War Assets Administration made a public offering of the Government-owned or outfitting section of the shipyard, consisting of the 52 acres, with the machinery, machine tools and equipment thereon. Appellant was the successful bidder and the award was made to it, April 11, 1949. The sale was confirmed by letter of intent from the Government to appellant, dated May 27, 1949 (R. 203). The letter of intent was introduced in evidence by the Government as Plaintiff's Exhibit 1, and is incorporated in this brief as Appendix B. The Government retained the Western Pacific lease, the eastern half or building section of the shipyard, and the machinery, machine tools and equipment thereon.

The letter of intent provided for the sale to appellant of the Government-owned section of 52 acres, together with

the machinery, machine tools and equipment thereon for $1,201,500. The letter of intent acknowledged receipt from appellant of a cash payment of $240,300 and provided that the balance of the purchase price of $961,200 was to be represented by appellant's promissory note, payable in 20 equal annual installments of $48,060 each with interest at 4%, secured by a deed of trust on the land and a chattel mortgage on the machinery, machine tools and equipment. Possession of the plant was given appellant June 1, 1949. Pursuant to the letter of intent, War Assets Administration, on June 1, 1949, conveyed and transferred the land to appellant by quitclaim deed (R. 52-65), and the machinery, machine tools and equipment by bill of sale (R. 7-12). At the same time appellant executed and delivered to the United States a promissory note for $961,200, together with a trust deed and chattel mortgage (R. 66-73) securing its payment.

The land and personal property were sold and conveyed to appellant *subject to a national security clause* which appears in the quitclaim deed only (R. 59-64). The national security clause in the quitclaim deed was made applicable to the personal property by reference to it in Paragraphs 1 and 2 of the bill of sale (R. 9). Authority for the security clause and the designation of the Secretary of Defense as the officer empowered and directed to administer the National Industrial Reserve are found in the National Industrial Reserve Act of 1948, Title 50 USCA, Sections 451-462 (Appendix A hereto).

The Munitions Board, which appears throughout this case, is a body *"established in the Department of Defense"* (5 USCA, Section 171h). On July 3, 1948, the *Secretary of Defense delegated his powers under the National Industrial Reserve Act of 1948 to the Munitions Board* (13 Federal Register 4576). Pursuant to paragraph 3 of the quitclaim deed (R. 59), appellant made application to the Munitions Board to modify the security clause on its property. The

Board approved appellant's application. *The clause was so modified,* February 28, 1950, (R. 73-81) *as to free appellant's machinery, machine tools and equipment from it.* The clause as modified remains on the land and its appurtenances *only* (R. 73-81).

Acting under the modified security clause, and Paragraph 9 of the letter of intent (Appendix B hereto), and Paragraphs 2 and 3 of the chattel mortgage (R. 68), appellant made seven separate sales to third persons of different lots and items of its machinery, machine tools and equipment (R. 40-52). Notice of such sales was given to General Services Administration, successor to War Assets Administration (Federal Properties & Administrative Services Act of 1949, Public Law 152, 81st Congress, effective July 1, 1949, Title 41 USCA, Sections 201-274). The parts of this Act, 41 USCA, Section 233(a)-(f), which are applicable to the disposal of surplus property are quoted in Appendix C of this brief. As required by Paragraph 9 of the letter of intent and paragraphs 2 and 3 of the chattel mortgage (R. 68), *appellant paid the Government the release prices fixed by it for all of the machinery, machine tools and equipment sold.* General Services Administration then *gave appellant written releases from the chattel mortgage covering all the items sold by appellant.* The releases have been recorded in the County Recorder's Office at Alameda County, California (R. 40-47).

This appeal is from the interlocutory order of the lower court granting a temporary injunction restraining *appellant from making further sales of its machinery, machine tools and equipment* during the pendency of the action *"without the written consent of the Secretary of the Navy"* (R. 84 and 97). After this appeal had been perfected (R. 85-90) to the order granting a temporary injunction, the Government appeared in the lower court and obtained another and second order granting a temporary injunction (R. 90-98). Appellant does not know the purpose of the

second order. Except for certain refinements in drafting, the findings of fact, conclusions of law, and temporary injunction are the same in both orders. The record shows (R. 85-90, 98 and 397-399) that the intent and purpose of appellant is to appeal from the interlocutory order of injunction granted in this case whether it appears in the first or second order, or in both of them.

QUESTIONS PRESENTED BY THIS APPEAL

1. Is the temporary injunction, prohibiting the appellant from selling or otherwise disposing of, *pendente lite, "without the written consent of the Secretary of the Navy,"* machinery, machine tools and equipment which appellant had purchased from the Government, subject to a national security clause *formulated by the Secretary of Defense* pursuant to the direction and authority given him by the National Industrial Reserve Act of 1948 (Appendix A of this Brief), *void on the face of the record,* where the complaint alleges and the affidavit in support of the injunction states, and the answer and counteraffidavit deny, and the lower court finds and concludes, that the Navy Department and its Secretary have jurisdiction over such chattels and that they cannot be sold or disposed of *"without the written consent of the Secretary of the Navy"?*

2. Can the Government maintain a suit involving a contract with a citizen made pursuant to the National Industrial Reserve Act of 1948 without alleging and proving that the suit was authorized by the *Secretary of Defense* on *whom and no one else Congress has conferred all authority, powers, and duties under the Act?*

3. Does the *Navy Department or its Secretary have any authority, powers, duties, or jurisdiction* in connection with or over property selected by the *Secretary of Defense* from excess industrial property for the National Industrial Re-

serve and sold and conveyed, under his direction, by War Assets Administration, or its successor in function, General Services Administration, *subject to a national security clause?*

4. Are not *all of the authority, powers, and duties over* and in connection with the *National Industrial Reserve Act of 1948* together with contracts made by the Government affecting it *vested by the National Industrial Reserve Act of 1948 in the Secretary of Defense?*

5. Does *a release or modification* of a national security clause in a specific case, *approved by the Munitions Board* to which Board the Secretary of Defense has delegated his authority, powers, and duties under the National Industrial Act of 1948, when executed by General Services Administration at the Board's direction, *bind the Navy Department and its Secretary as well as all other units and officers subordinate to the Secretary of Defense?*

6. Do *written partial releases,* executed by General Services Administration, *from a chattel mortgage,* held by the Government as security for the purchase price of machinery, machine tools and equipment sold appellant, subject to a national security clause, *which has been removed from such machinery, machine tools and equipment* at the direction of the Munitions Board, *terminate all interest of the Government in the chattels released?*

7. Could the Government *maintain this suit, or apply for an injunction, or the lower court grant one,* until it was alleged and proved that the Secretary of Defense or his delegate, the Munitions Board, *had exhausted the administrative remedies,* authorized by the National Industrial Reserve Act of 1948, and provided for in the national security clause which is a part of the contract between the parties, executed by the Government and the appellant?

SPECIFICATION OF ERRORS RELIED UPON

1. The lower court erred in denying the motion to dismiss the complaint.

2. The lower court erred in granting the temporary injunction.

3. The lower court erred in its findings of fact of which the following are the particular specifications:

(a) In finding that the national security clause, applicable to appellant's machinery, machine tools and equipment, was contained only in the bill of sale without making a finding as to the effect of the reference therein in paragraphs 1 and 2 to the national security clause on the plant, including the machinery, machine tools and equipment, which clause appears only in the original quit claim deed; and in finding by inference that the subsequent modification of this original national security clause had not removed the clause from appellant's machinery, machine tools and equipment (Findings III, R. 92, and IX, R. 95).

(b) In finding that the Navy Department has jurisdiction over appellant's machinery, machine tools and equipment under the National Industrial Reserve Act of 1948 and the National Security Act of 1947, as amended in 1949, and the contracts made pursuant thereto; and that the appellant has, in violation of these Acts and contracts, sold and disposed of some of its machinery, machine tools and items of industrial equipment "without the written consent of the Secretary of the Navy"; and appellant will, unless restrained by the court, make other sales "without the written consent of the Secretary of the Navy"; and that further sales "without the written consent of the Secretary of the Navy" will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 (Findings V and VI, R. 94-95).

(c) In finding that there was an obligation on the part of the appellant to replace the machinery, machine tools and

equipment already sold and all of such chattels as might be sold in the future "without the written consent of the Secretary of the Navy" in which findings the court did not take into consideration or make any finding thereon that the national security clause had been removed from all of appellant's machinery, machine tools and equipment by the subsequent modification of the clause (Findings VI and VII, R. 94-95).

(d) In finding that the United States had been damaged by the sales of the machinery, machine tools and equipment already made "without the written consent of the Navy" and that the Government will suffer irreparable damage from all future sales, which may be made "without the written consent of the Secretary of the Navy," unless restrained by the court from so doing (Finding X, R. 96).

(e) The lower court omitted to find that the national security clause had been modified February 28, 1950 (R. 73-80) and that the modification had removed the national security clause from appellant's machinery, machine tools and equipment.

(f) By omitting to find that the written partial releases from the chattel mortgage, after payment by the appellant to the Government of the fair value of the chattels sold, terminated all interest of the Government in such chattels and because of that fact the Government's claim for damages for the chattels sold "without the written consent of the Secretary of the Navy" was without basis in fact.

(g) By failing to find that the Government could not maintain this action because neither the Secretary of Defense nor his delegate, the Munitions Board, had made any attempt, before bringing this suit, to exhaust the administrative remedies authorized by the National Industrial Reserve Act of 1948 and provided for pursuant to the Act in the national security clause contained in the modified quitclaim deed.

(f) In finding (R. 96) that the Navy Department and its

Secretary, who are strangers to the National Industrial Reserve Act of 1948, had any authority, power or duties under the Act, and in omitting to find that all of the powers under the Act are conferred by The Congress upon the Secretary of Defense and his delegate, the Munitions Board, to which Board the delegation was made by the Secretary of Defense subject to his direction, authority and control.

4. The lower court erred (R. 96-97) in its conclusions of law by concluding that the appellant's machinery, machine tools and items of industrial equipment are still a part of the national industrial reserve and are in the possession of the appellant subject to a national security clause—appearing only in the bill of sale, without reference to its modification, removing the clause from the chattels sold and transferred to appellant by the bill of sale—within the meaning of the National Industrial Reserve Act of 1948 and that the Government was entitled to a temporary injunction restraining the appellant from selling any more of such chattels "without the written consent of the Secretary of the Navy."

5. The lower court erred in granting the temporary injunction on the foregoing erroneous findings of fact and conclusions of law, and in granting any injunction based upon the "written consent of the Secretary of the Navy," an officer upon whom the National Industrial Reserve Act of 1948 confers no authority, powers or duties, and to whom no delegation has been made by the Secretary of Defense of his authority, powers and duties under the Act.

ARGUMENT

SUMMARY OF ARGUMENT

POINT I, INFRA

Where Congress has vested in the Secretary of Defense all of the authority, powers and duties to be exercised and performed under the National Industrial Reserve Act of

1948 (50 USCA, Sections 451-462), which Act is authority for the creation of the national industrial reserve out of World War II excess industrial property and provided for sale of this property, subject to a national security, or recapture, clause in the event of a national emergency, a complaint alleging damages for the sale by an owner thereof of personal property, alleged to be held by the owner under a national security clause, "without the written consent of the Secretary of the Navy", which complaint seeks an injunction to prevent alleged future sales, "without the written consent of the Secretary of the Navy", who is without authority under the Act, fails to state a cause of action, and a temporary injunction granted preventing all sales *pendent lite* "without the written consent of the Secretary of the Navy" is void on the face of the record.

POINT II, INFRA

When real and personal property is sold to a purchaser subject to a national security clause formulated by the Secretary of Defense pursuant to the terms of the Act, subsequent modification of that security clause, so as to remove the personal property from its restrictions, is binding upon the United States and no suit may be maintained by the Government on the original security clause; and it was error for the lower court to grant a temporary injunction in the action restraining the owner *pendent lite* from making other sales of his chattels from which the national security clause had been removed.

POINT III, INFRA

When a chattel mortgage is given to the Government as security for the payment of the balance of the purchase price of property purchased from the Government under the Act, partial releases of the chattels from the lien of the mortgage made by the Government, upon the payment to it

by the owner of the release prices fixed in the chattel mortgage, and when such releases are made pursuant to a covenant in the contracts between the Government and the owner, that the releases will be given only in the event that the provisions of the national security clause have been removed from the chattels, such partial releases terminated all interest of the Government in the chattels sold and the Government has no right to maintain a suit for damages or an injunction for the property so sold or threatened to be sold.

POINT IV, INFRA

Where a modified national security clause affecting property sold pursuant to the National Industrial Reserve Act of 1948 makes it incumbent upon the Secretary of Defense to exhaust his administrative remedies reserved to him in the contract and made pursuant to the authority vested in him by the Act, no suit alleging damages for a breach of such security clause or for an injunction therein can be maintained by the Government until it has first alleged and proved that these mandatory administrative remedies have been exhausted by the Secretary of Defense.

POINT I

The Temporary Injunction Is Void On the Face of the Record

The complaint alleged (R. 2-7) and the lower court found and concluded (R. 83-85 and 91-98) that the national security clause formulated by the Secretary of Defense under the National Industrial Reserve Act of 1948 had been imposed upon the personal property purchased by appellant from the Government solely by the bill of sale, dated June 1, 1949; that the Navy Department was the department of the Government which had jurisdiction over the machinery, machine tools and equipment sold and delivered to appel-

lant; that certain of appellant's machinery, machine tools and equipment had been sold to third persons "without the written consent of the Secretary of the Navy"; that, unless restrained by order of the court, appellant would sell more of its machinery, machine tools and equipment "without the written consent of the Secretary of the Navy" to the irreparable damage of the Government.

The temporary injunction (R. 97) *restrains appellant* during the pendency of the action *from selling or otherwise disposing of its machinery, machine tools and equipment, acquired by appellant from the Government under the bill of sale, "without the written consent of the Secretary of the Navy"*. There is nothing in the National Industrial Reserve Act of 1948 (50 USCA, Sections 451-462), or in the National Security Act of 1947 as amended in 1949 (5 USCA, Sections 171 and 171a-171h) which gives the Department of the Navy, or its Secretary, any authority or power over the national industrial reserve, or over the contracts made by the Government with appellant, or over any other contract made pursuant to the National Industrial Reserve Act of 1948. Appellant quotes below so much of the National Industrial Reserve Act of 1948 (50 USCA, Secs. 452(a) and (c), 453(1), (2), and (3)) as it deems necessary to a decision herein.

Sec. 452. *Definitions*

"(a) The term '*national industrial reserve*', as used in this chapter, means that *excess industrial property which has been or may hereafter be sold,* leased, or otherwise disposed of *by the United States, subject to a national security clause* * * *"

"(c) The term 'national security clause', as used herein, means those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated under section 453(2) of this title for insertion in instruments of sale or lease of property, determined in accordance with section 453(1) of this title to be a part of the national industrial reserve, which will guar-

antee the availability of such property for the purposes of national defense at any time when availability thereof for such purposes is deemed necessary by the Secretary of Defense."

Sec. 453. *Powers and duties of Secretary of Defense*

"To effectuate the policy set forth in section 451 of this title *the Secretary of Defense is authorized and directed to*—

(1) determine which excess industrial properties should become a part of the national industrial reserve under the provisions of this chapter;

(2) formulate a national security clause, as defined in section 452(c) of this title *and vary or modify the same from time to time in such manner as best to attain the objectives of this chapter,* having due regard to securing advantageous terms to the Government in the disposal of excess industrial property;

(3) *consent to the relinquishment or waiver of all or any part of any national security clause in specific cases* when necessary to permit the disposition of particular excess industrial property when it is determined that the retention of the productive capacity of any such excess industrial property is no longer essential to the national security or that *the retention of a lesser interest than that originally required will adequately fulfill the purposes of this chapter* * * *"

Before it was sold to appellant, subject to a national security clause, the real and personal property which appellant purchased from the Government was World War II excess industrial property. The national security clause originally imposed upon appellant's property (Sec. 452(c), *supra)* is found in paragraphs 1 to 15 of the quitclaim deed, dated June 1, 1949 (R. 59-64). Section 453, *supra, authorized* and *directed* the *Secretary of Defense* to determine (Sec. 453(1), *supra)* whether or not this property should be selected from excess industrial property for the national industrial reserve of which it became a part when it was sold (Sec. 452(a) *supra*) to appellant, subject to a national

security clause (Sec. 452(c), *supra*), formulated by the Secretary of Defense (Sec. 453(2), *supra*).

Section 453(3), *supra,* authorizes the Secretary of Defense to remove the security clause in whole or in part from any specific piece of property in the national industrial reserve. It was under this power to change the clause, which power is also reserved in appellant's old security clause (Par. 3, Original Quitclaim Deed, R. 59), that the Munitions Board consented to the modification of the original clause (R. 73-80) so as to remove it from appellant's machinery, machine tools and equipment.

Appellant quotes below so much of the National Security Act Amendments of 1949 (5 USCA, Secs. 171, 171a, 171a, 171h) as it deems necessary to a decision herein:

Sec. 171. *Establishment and composition*

"(a) There is established, as an Executive *Department of the Government, the Departmnet of Defense,* and *the Secretary of Defense shall be the head thereof;*

"(b) There shall be within the Department of Defense (1) the Department of the Army, the Department of the Navy, and the Department of the Air Force, and each such department shall on and after August 10, 1949, be military departments in lieu of their prior status as Executive Departments. * * *"

Sec. 171a. *Secretary of Defense—(a) Appointment*

"(a) There shall be a Secretary of Defense, who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate: * * *"

"(c)(4) The *Departments of the Army, Navy, and Air Force* shall be separately administered by their respective Secretaries *under the direction, authority, and control of the Secretary of Defense.*"

Sec. 171h. *Munitions Board—Establishment*

"(a) There is established in the Department of Defense a Munitions Board (hereinafter in this section referred to as the "Board")."

Composition; appointment, compensation, and powers of Chairman

"(b) The Board shall be composed of a *Chairman,* who shall be the head thereof and *who shall, subject to the authority of the Secretary of Defense and in respect to such matters authorized by him, have the power of decision upon matters falling within the jurisdiction of the Board,* and an Under Secretary or Assistant Secretary from each of the three military departments, to be designated in each case by the Secretaries of their respective departments. *The Chairman shall be appointed from civilian life by the President,* by and with the advice and consent of the Senate, and shall receive basic compensation at the rate of $16,000 per annum."

The parts of the National Security Act Amendments of 1949, quoted above, establish a new Executive Department of the Government and name it the Department of Defense of which the Secretary of Defense is made the head. The status of Army, Navy, and Air is changed from Executive Departments, the positions they enjoyed under the so-called Unification Act of 1947, to military departments, subordinate to the Department of Defense and subject to the authority, control, and direction of the Secretary of Defense. The powers of the Munitions Board, a body *"established in the Department of Defense,"* are expanded so as to give the Chairman, who must be a civilian, *"the power of decision",* subject to the authority and control of the Secretary of Defense, on all matters falling within the jurisdiction of the Board.

These great powers vested by The Congress in the Secretary of Defense cannot be treated lightly by the Navy Department and its Secretary. To hold, as the Government persuaded the lower court to do, that the Navy Department and its Secretary, who are subordinate to the Secretary of Defense, can, without any direction or authority from him, control and dispose of all former naval property now in

the national industrial reserve, amounts to the granting of a license to any one of the sixty-eight thousand naval officers to administer such property, sole authority over which has been conferred by The Congress on the Secretary of Defense. Especially is this true in the light of the proof by the Government (R. 161-162, 13 *Federal Register* 4576), that the Secretary of Defense had delegated his authority, powers and duties under the National Reserve Act of 1948 to the Munitions Board, a body wholly independent of the Navy Department and its Secretary; a board established by The Congress to prevent just what has happened here; and a board which has been given by the Secretary of Defense, subject to his authority and control, full power over the national industrial reserve. The Navy Department and its Secretary appear here to be mere usurpers.

The National Industrial Reserve Act of 1948 was approved July 2, 1948. The next day, July 3, the Secretary of Defense made the following delegation to the Munitions Board:

"NATIONAL MILITARY ESTABLISHMENT
Secretary of Defense
NATIONAL INDUSTRIAL RESERVE OF GOVERNMENT-OWNED PROPERTY
DELEGATION OF AUTHORITY

Pursuant to the authority vested in the Secretary of Defense by the National Security Act of 1947 (61 Stat. 495), there are hereby delegated to the Munitions Board the functions, powers, duties and responsibilities of the Secretary of Defense under Public Law 883, 80th Congress (50 USCA, Sections 451-462), approved July 2, 1948.

James Forrestal,
Secretary of Defense.

July 3, 1948"

13 *Federal Register* 4576

No other delegation by the Secretary of Defense, of his authority, power or duties under the National Industrial

Reserve Act, has been made and this delegation was made more than a year before the National Security Act Amendments of 1949 were adopted by The Congress. There is no allegation in the complaint, nor was there any attempt on the part of the Government to show that the Secretary of Defense, or the Munitions Board, authorized the bringing of the action, or even knew of it. The Navy Department and its Secretary are wholly without authority over appellant's property, or any part of the national industrial reserve, and the temporary injunction attempting to confer such authority on the Secretary of the Navy makes the injunction void on the face of the record.

The statutes themselves settle the contentions of appellant in its favor. However, appellant presents the case of *Cudahy Packing Company of Louisiana* v. *Holland,* 315 U. S. 357, 62 Sup. Ct. 651, which is directly in point. The question involved in the Cudahy case was whether the Administrator of the Wage and Hour Division of the Department of Labor had the authority to delegate his statutory power, given him by the Fair Labor Standards Act, to sign and issue a *subpoenas duces tecum.* The Administrator contended that the act gave him authority to delegate this power to his Regional Directors. The Supreme Court held that no such delegation could be made:

> "If, as the Administrator contends, the section is to be read as authorizing delegation of the subpoena power, that authority is without limitation. *He may confer the power on any employee appointed under Sec. 4(b), whom 'he deems necessary to carry out his functions and duties',* or even on those who render the voluntary and uncompensated service which he may accept under that section. *Moreover, if so read, Sec. 4(c) likewise gives the Administrator unrestricted authority to delegate every other power which he posesses, and would render meaningless and unnecessary the provisions of Sec. 11 authorizing the Administrator to delegate his power of investigation to designated representatives.*

"If such is the meaning of the Act he could delegate at will his duty to report periodically to Congress, Sec. 4(d), to appoint industry committees and their chairmen, to fix their compensation and prescribe their procedure, Sec. 5, to approve or disapprove their reports by orders whose findings of fact, if supported by substantial evidence, are conclusive, Sec. 10, to define certain terms used in the Act, Sec. 13, to provide by regulations or orders for the employment of learners and handicapped workers, Sec. 14, as well as other duties. *A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.*

In the light of the facts and the law the motion of appellant to dismiss the complaint should have been granted and the temporary injunction denied; and the lower court erred in not so doing.

POINT II

The Modified Security Clause, Dated February 28, 1950, Terminated the Conditions and Restrictions of the National Security Clause Contained in the Bill of Sale of June 1, 1949.

The lower court found, in Finding III (R. 92-93) as follows:

By bill of sale dated June 1, 1949, plaintiff, acting through the War Assets Administration, an agency of the United States, sold, transferred, assigned, and delivered to the defendant certain industrial equipment, machine tools, and tools, more particularly described in said bill of sale as—(description omitted) upon the covenants, restrictions, conditions, and reservations set forth in said bill of sale, including, among others, the following:

"1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the 'plant', in which the

above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

"2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.

"3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

Said covenants, restrictions, conditions, and reservations comprise the "National Security Clause," as that term is defined in Section 452(c), U.S.C.A. Title 50.

It was error for the lower court to omit from its finding of fact and conclusion of law all reference to the modified security clause of February 28, 1950 (R. 74-81). Paragraphs 1 and 2 of the bill of sale, quoted above in Finding III, by reference put the machinery, machine tools and equipment under the security clause contained in the original quitclaim deed of June 1, 1949. This security clause gives the

Government an option to lease the plant at any time within 20 years from its date (R. 59) "for one or more periods not exceeding 5 years' duration each". Paragraph 10 of the quitclaim deed (R. 62) reserves to the Government this option to lease the land and permanent structures and appurtenances for 20 years; the timber structures and their appurtenances for 15 years; and the machinery, machine tools and equipment for 10 years. *The modified security clause of February 28, 1950* (R. 74-81) *removes the reservations, conditions and restrictions from the timber structures and appurtenances and from the machinery, machine tools and equipment.*

The Government prepared both the original and modified security clauses. Like numbered paragraphs in each clause treat similar subjects. *The modified security clause was approved by the Munitions Board; and at the direction of the Board, General Services Administration executed it; appellant also executed it.* The removal of the restrictions on the machinery, machine tools and equipment are shown by a comparison of Paragraph 10 of the old clause with Paragraph 10 of the new clause, which for the convenience of the court are set out below:

Old Clause
(R. 62)

(June 1, 1949)

10. The Grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to the United Sttaes of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time, but in no case in excess of 120 days; *provided, however, that Grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified;* and provided further that nothing contained in

this agreement shall be construed to prevent the Grantee, for improving operating efficiency or increasing productive capacity, from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.

Facility	*Period Maintenance*
(a) Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry	20 years
(b) Timber structures and their appurtenances	15 years
(c) *Machinery, machine tools and equipment*	10 years

New Clause
(R. 78)

(February 28, 1950)

10. The Grantee will maintain all lands, structures and appurtenances now on the plant and all buildings and structures placed thereon by Grantee, reasonable wear and tear and aging excepted, through the twenty-year period in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time but in no event, in excess of 120 days.

The italicized lines of Par. 10 of the old clause show that appellant was *obligated to retain, replace and maintain* the machinery, machine tools and equipment for ten years from June 1, 1949. Par. 10 of the new clause terminated this obligation of appellant. The modified security clause executed by General Services Administration, with prior approval of the Munitions Board, is binding upon the Government and is by Act of Congress made conclusive evidence of its regularity and effectiveness.

Sec. 233 (d), 41 USCA "A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter

shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance."

The lower court erred in failing to find that the modified quit claim deed removed the security clause from the machinery, machine tools and equipment.

The bill of sale cannot stand alone because the condition of paragraph 3, Finding III, (R. 92) is a mere covenant against resale void under all of the authorities. The rule is statutory in California where this property is located.

"Conditions restraining alienation, when repugnant to the interest created are void."

California Civil Code, Section 711

There is no reverter in the bill of sale, or in the security clause in the quit claim deed to which it refers. The condition against resale is void as an unlawful restraint on alienation. The property is in California and is controlled by the law of that State.

"A rich oil field was discovered in Illinois in 1938. Thereupon this dispute arose between a trustee of a railroad in reorganization under Sec. 77 of the Bankruptcy Act, 11 U.S.C. Sec. 205, 11 U.S.C.A. Sec. 205, and other claimants as to the legal right to drill for and capture fugitive oil under the railroad's right-of-way traversing the newly discovered field. The trustee asserts fee simple ownership of the right of way lands with consequent right to reduce the underlying oil by possession. Respondents deny the trustee's alleged title or that he has any interest in the land beyond a mere easement—a limited right to use the surface for railroad purposes only. They allege that ownership of the fee is in others, from whom they have obtained oil leases. *This determinative question of fee simple own-*

ership can be decided only by interpretation, under Illinois law, of instruments granting the railroad its right of way.'' (Italic ours.)

Thompson v. *Magnolia Petroleum Co.,* 309 U. S. 478, 60 Sup. Ct. Rep. 628.

Conditions restraining alienation are void in California under the common law, as well as by statute.

''In this State it has been declared that when the granting clause in a deed purports *to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former, and being in restraint of alienation is void.* (Civil Code Section 711.)

''* * * the rule that conditions in restraint of alienation when repugnant to an interest created are void (Civil Code, Section 711), 'does not depend upon the mere form in which the restraint is imposed.' It avoids as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; *such covenants, if not within the letter of Section 711 of the Civil Code, are yet obnoxious to the policy of which that Section is a partial expression.''*

Bonnell v. *McLaughlin,* 173 Cal. 213, 159 Pac. 590.

The Supreme Court is in accord with California rule.

''Thus, *general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels,* except when a very special kind of property is involved, such as a slave or an heirloom, *have been generally held void.'* 'If a man,' says Lord Coke in 2 Coke on Littleton, Section 360, 'be possessed of a horse or of *any other chattel, real or personal, and give or sell his whole interest*

or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest or property is out of him, so as he has no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man.' "

Dr. Miles Medical Co. v. *John D. Parks and Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376.

The error in granting the temporary injunction preventing further sales of appellant's machinery, machine tools and equipment "without the written consent of the Secretary of the Navy" probably arose because of a recital in Par. 3 of the bill of sale set out in Finding III (R. 93),— That none of the machine tools or other severable production equipment in the plant would be sold without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction. The recital is meaningless. Neither of the three Secretaries, Army, Navy or Air are given any power or duties by the National Industrial Reserve Act of 1948. Besides, Par. 14 of the modified security clause (R. 80) provides: "As used in this agreement the term 'Secretary' shall be deemed to refer to the Secretary of Defense, as used in Public Law 883, 80th Congress and to his duly appointed representatives". Neither the Department of the Army, the Department of the Navy, nor the Department of Air, nor any one of their respective secretaries, has been appointed the representative of the Secretary of Defense, in this transaction, or in any other involving the National Industrial Reserve. The Munitions Board is the only duly appointed representative of the Secretary of Defense. It is an entirely separate body from Army, Navy and Air. The Munitions Board approved the modified security clause releasing the machinery, machine tools and equipment from it. In these circumstances it is difficult to understand why the Govern-

ment brought the action, or why the lower court entertained it and granted the injunction therein. In modifying the security clause, the Munitions Board was exercising the discretionary powers of the Secretary of Defense delegated to the Board by him. The lower court was without power to grant the temporary injunction defeating the exercise of this discretion.

POINT III

Before the Government Could Maintain the Action or Apply For An Injunction Therein, It Had To Show That It Had Complied with the Contractual and Administrative Remedies Set Out in Paragraphs 11 and 12 of the Modified Security Clause Which It Made No Attempt To Do

Pars. 5 and 6 of the bill of sale (R. 11) and Pars. 11 and 12 of the original security clause (R. 63) are almost identical. The new security clause of February 28, 1950 (R. 78) changed these paragraphs. Quoted below are pars. 11 and 12 of the original and modified security clause.

Original, dated June 1, 1949

(R. 63)

"11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

"12. When, in the opinion of the Secretary, the Grantee fails to comply with the obligations imposed upon it hereunder, the United States of America shall have the right to take full possession of the plant and to take such action as may be necessary to remedy the Grantee's default. All costs incidental to taking possession of the plant under these circumstances and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the

plant will be returned to the Grantee unless the dormant estate is activated in the interim."

Modified, dated February 28, 1950
(R. 78-79)

"11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

"12. If, as a result of inspection of the plant, the Government *adjudges the Grantee in default, it shall furnish to the latter a written statement setting forth in detail the grounds on which the allegations are based,* following which *the Grantee shall have thirty days to submit evidence to the contrary.* If, in the light of the evidence so presented, *the Government still holds that the Grantee is in default, it shall then advise the latter of the specific defaults to be corrected and the periods of time in which each correction must be completed,* such periods to be as reasonable as possible. If the Grantee fails to correct *its defaults in the time stated, the Government shall then have the right to take possession only of that part of the premises on which the breach has occurred and to remedy the Grantee's default.* The Government, or any contractor employed by the Government for the purpose, shall have such right of access over Grantee's premises to that part thereof as may be necessary to permit repairs and replacements to be made to correct the default of Grantee. *All costs incidental to taking possession of such part of the plant as may be necessary under these circumstances, and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee.* Upon completion of such work, possession of the part, or parts, of the plant taken over by the Government will be returned to the Grantee unless the dormant estate is activated in the interim."

Pars. 11 and 12 of the original security clause gave the Government an option to enforce the remedies provided in them. Not so with the new security clause which requires

the Government to give appellant a written statement setting forth the details of an alleged default. Appellant is then given thirty days to present evidence in opposition to the Government's claim of a default. If, on the evidence so presented, the Government holds that appellant is still in default, the Government must inform appellant of the specific default which it requires appellant to correct and set the time in which the correction must be made. If appellant should fail to correct the default within the time specified, the Government has the right to take possession of the part of the plant where the default has occurred and to correct it, charging the cost of the correction to appellant, which cost the Government could add to the principal of the note secured by the deed of trust and chattel mortgage (Par. 4; R. 69). The Government cannot make out a cause of action for damages or injunction until it has complied strictly with these provisions of the contract. The Government has made no attempt to do so.

Pars. 11 and 12 of the modified security clause provide administrative remedies authorized by the National Industrial Reserve Act of 1948 (Section 456(1), (4), 50 USCA) and amount to regulations made by the Secretary of Defense for the administration of appellant's property under the terms of the modified security clause. The Navy Department and its Secretary by attempting to usurp the control and administration of this former naval property through this suit are attempting to frustrate and subvert the military policy of the nation established by the Congress in the National Security Act of 1947 as amended, popularly known as the "Unification Act," and in the National Industrial Reserve Act of 1948. This is a most unpropitious time for a subordinate military unit to assert its independence of directives made by its chief.

The only method provided in the National Industrial Reserve Act of 1948 for the administration of the National In-

dustrial Reserve is by contracts made by the Government with its citizens at the direction of the Secretary of Defense, the terms and conditions of which contracts he is directed by the Congress to formulate (Sec. 453(2), 50 USCA). The property now owned by appellant passed into the National Industrial Reserve by means of a sale and conveyance of it by the Government to appellant, subject to a national security clause (Sec. 452(a), 50 USCA), formulated by the Secretary of Defense. These directives are contained in the contracts so made by the Government with appellant; they were authorized by the Secretary of Defense under the direction of the Congress; and they require the Secretary of Defense, or his designated representative, the Munitions Board, to afford the appellant the opportunity to be heard before this action could be maintained.

Administrative Procedure Act, 5 USCA, Secs. 1002, 1006;

Monolith Portland Midwest Company v. *Reconstruction Finance Corporation* (Court of Appeals, 9th Circuit), 178 Fed. 2d 854;

Morgan v. *United States,* 298 U. S. 468, 56 Sup. Ct. 906;

Morgan v. *United States,* 304 U. S. 1, 58 Sup. Ct. 773.

POINT IV

The Releases From the Chattel Mortgage Relinquished All Interest the Government Had In the Chattels Sold; and the Payments to the Government of the Fair Value of the Chattels Sold Defeats Its Claim for Damages. The Government Has No Right To An Injunction Because the Remaining Chattels Cannot Be Sold Unless Released from the Chattel Mortgage

Par. 9 of the letter of intent (Government Exhibit No. 1) which is Appendix B of this brief, is the start of the written releases.

"9. In the event the *restrictions of the National Se-*

curity Clause are removed from the personal property to be transferred, the Government will release the personal property from the lien of the chattel mortgage upon payment by purchaser of a total amount not to exceed $366,660.00 to be applied against the unpaid balance of the total indebtedness in inverse order of maturity."

This provision of the letter of intent was carried forward into Paragraphs 2 and 3 of the chattel mortgage (R. 68). Paragraphs 2 and 3 of the chattel mortgage are as follows:

> "2. Mortgagor shall not have the right, power or authority to, and will not, *without the written consent of Mortgagee, remove from its present location as herein above set forth, or sell or encumber any of the mortgaged chattels,* or substitute or replace any of the mortgaged chattels."
>
> "3. The Mortgagee *agrees to release all the chattels from the lien of this chattel mortgage* upon the payment by Mortgagor to Mortgagee the sum of Three Hundred Sixty-six Thousand Six Hundred Sixty Dollars ($366,660), *which sum has been established as the fair value of said chattels. The Mortgagee will also release a part or any portion of said chattels upon the payment by the Mortgagor to Mortgagee of the fair value (fair value to be established by Mortgagee) of the property to be released.* All payments so made shall be applied against the unpaid balance of the total indebtedness of Nine Hundred Sixty-one Thousand Two Hundred Dollars ($961,200) in the inverse order of maturity, as specified in the terms of the promissory note of even date."

Upon the release of the security clause from the chattels, appellant sold some of the machinery, machine tools and equipment and paid the Government their *fair value fixed by the Government* as provided for in Paragraph 3 of the chattel mortgage. The Government, acting through General Services Administration, after notice that the prop-

erty had been sold, gave written releases to appellant in accord with Paragraph 2 of the chattel mortgage for the property so sold (R. 40-52).

Paragraph 2 of the letter of intent required compliance with *War Assets Administration Regulation* No. 5, Paragraph 6 of which regulation defines "fair value". It reads as follows:

> "(6) *'Fair value' means the maximum price which a well-informed buyer, acting voluntarily and intelligently, would be warranted in paying if he were acquiring the property for investment or for use with the intention of devoting such property to the best or most productive type of use for which the property is suitable or capable of being adapted."* (Italic in the original.)

The releases so made are conclusive evidence of their regularity and of the title and interest conveyed by the Government (41 USCA, Section 233(d) (Appendix C hereto). This leads us to inquire on what theory the Government seeks damages or an injunction. The security clause has been released on the chattels by the modified quitclaim deed; the Government has accepted the fair value fixed by it for the chattels sold and has released them from the lien of the chattel mortgage in accord with provisions of Paragraphs 2 and 3, *supra,* of the chattel mortgage and Paragraph 9 of the letter of intent. The releases were made by a responsible agency of the Government authorized by Congress to make them and they were given in strict accord with the contracts made pursuant to Congressional direction. The Government is bound by its contracts with appellant the same as an individual would be.

Los Angeles and Salt Lake Ry. v. *U. S.* (Ct. of App. 9th Cir.), 140 Fed. 2d 436;

Standard Oil Co. of New Jersey v. *U. S.,* 267 U. S. 76, 45 Sup. Ct. 211.

The order granting the temporary injunction is erroneous and should be reversed.

Respectfully submitted,

Wm. H. Neblett,
615 Latham Square Bldg.,
Oakland, Cal.,
Attorney for Appellant.

APPENDIX

APPENDIX A

PUBLIC LAW 883—80TH CONGRESS
CHAPTER 811—2D SESSION
S. 2554

50 USCA, SECTIONS 451-462

CHAPTER 16—NATIONAL INDUSTRIAL RESERVES (NEW)

Sec. 451. Congressional declaration of purpose and policy

In enacting this chapter, it is the intent of Congress to provide a comprehensive and continuous program for the future safety and for the defense of the United States by providing adequate measures whereby an essential nucleus of Government-owned industrial plants and a national reserve of machine tools and industrial manufacturing equipment may be assured for immediate use to supply the needs of the armed forces in time of national emergency or in anticipation thereof; it is further the intent of the Congress that such Government-owned plants and such reserve shall not exceed in number or kind the minimum requirements for immediate use in time of national emergency, and that any such items which shall become surplus to such requirements shall be disposed of as expeditiously as possible.

Sec. 452. Definitions

(a) The term "national industrial reserve", as used in this chapter, means that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause, and that excess industrial property of the United States which not having been sold, leased, or otherwise disposed of, subject to a national security clause, shall be transferred to the Administrator of General Services under section 454 of this title.

(b) The term "excess industrial property," as used herein, means any machine tool, any industrial manufacturing equipment and any industrial plant (including structures on land owned by or leased to the United States, substantially equipped with machinery, tools and equipment) which is capable of economic operation as a separate and independent industrial unit and which is not an integral part of an installation of a private contractor, which machine tools, industrial manufacturing equipment, and industrial plants are under the control of any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation and which are not required for its immediate needs and responsibilities as determined by the head thereof.

(c) The term "national security clause", as used herein, means those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated under section 453 (2) of this title for insertion in instruments of sale or lease of property, determined in accordance with section 453 (1) of this title to be a part of the national industrial reserve, which will guarantee the availability of such property for the purposes of national defense at any time when availability thereof for such purposes is deemed necessary by the Secretary of Defense.

Sec. 453. Powers and duties of Secretary of Defense

To effectuate the policy set forth in section 451 of this title the Secretary of Defense is authorized and directed to—

(1) determine which excess industrial properties should become a part of the national industrial reserve under the provisions of this chapter;

(2) formulate a national security clause, as defined in section 452(c) of this title and vary or modify the same from time to time in such manner as best to attain the objectives of this chapter, having due regard to se-

curing advantageous terms to the Government in the disposal of excess industrial property;

(3) consent to the relinquishment or waiver of all or any part of any national security clause in specific cases when necessary to permit the disposition of particular excess industrial property when it is determined that the retention of the productive capacity of any such excess industrial property is no longer essential to the national security or that the retention of a lesser interest than that originally required will adequately fulfill the purposes of this chapter: *Provided,* That nothing in this subsection shall require the modification or waiver of any part of any such national security clause when such clause is deemed necessary by the Secretary of Defense to effectuate the purposes of this chapter; and

(4) designate what excess industrial property shall be disposed of subject to the provisions of the national security clause.

Sec. 454. Plant disposal; modification of national security clause; transfer to Administrator of General Services; machine tools

(a) In the event that any agency charged with the disposal of excess industrial property, after making every practicable effort so to do, is unable to dispose of any excess industrial plant because of the national security clause it shall notify the Secretary of Defense, indicating such modifications in the national security clause, if any, which in its judgment would make possible disposal of the plant. The Secretary of Defense shall consider and agree to any and all such proposed modifications as in his judgment would be consistent with the purposes of this chapter. If, however, such clause is not modified or the requirements thereof waived pursuant to section 453(c) of this title, or if modified, such plant cannot then be disposed of under such modified clause, the Secretary of Defense shall direct that such plant be transferred to the Administrator of Gen-

seral Services, and such transfer shall be without reimbursement or transfer of funds.

(b) Nothwithstanding any other provisions of law, any agency charged with the disposal of excess machine tools and industrial manufacturing equipment shall transfer custody of such machine tools and equipment as may be designated by the Secretary of Defense pursuant to section 453 of this title to the Administrator of General Services, without reimbursement, for storage and maintenance.

Sec. 455. Acceptance of plants by Administrator of General Services; disposition; conditions of lease

Subject to provisions of section 456 of this title, the Administrator of General Services is authorized and directed to accept the transfer to it of such excess industrial property as is directed to be transferred to it under section 453 of this title and, as and when directed or authorized by the Secretary of Defense pursuant to section 456 of this title, to utilize, maintain, protect, repair, restore, renovate, lease, or dispose of such property. Notwithstanding section 303(b) of Title 40, any lease may provide for the renovation, maintenance, protection, repair, and restoration by the lessee of the property leased, or of the entire unit or installation when a substantial part thereof is leased, as part or all of the consideration for the lease of such property.

Sec. 456. Powers of Secretary of Defense respecting property in national industrial reserve

The Secretary of Defense, with respect to property in the national industrial reserve, is authorized when he deems such action to be in the interest of national security—

(1) to establish general policies for the care, maintenance, utilization, recording, and security of such property transferred to the Administrator of General Services pursuant to section 454 of this title; and

(2) to direct the transfer without reimbursement by the Administrator of General Services of any of such property to other Government agencies with the consent of such agencies; and

(3) to direct the leasing by the Administrator of General Services of any of such property to designated lessees; and

(4) to authorize the disposition by the Administrator of General Services of any of such property by sale or otherwise when in the opinion of the Secretary of Defense such property may be disposed of subject to or free of the national security clause provided for in section 454 of this title; and

(5) to authorize and regulate the lending of any such property by the Administrator of General Services to any nonprofit educational institution or training school when (a) the Secretary shall determine that the program proposed by such institution or school for the use of such property will contribute materially to national defense, and (b) such institution or school shall by agreement make such provision as the Secretary shall deem satisfactory for the proper maintenance of such property and for its return to the Administrator of General Services without expense to the Government.

Sec. 457. Transportation, maintenance, disposition, etc., by Administrator of General Services of transferred property

As and when directed or authorized by the Secretary of Defense pursuant to the provisions of section 456 of this title, the Administrator of General Services shall after the date upon which transfer is directed pursuant to section 454 of this title provide for the transportation, handling, care, storage, protection, maintenance, utilization, repair, restoration, renovation, leasing, and disposition of excess industrial property.

Sec. 458. Limitation on acquisition of property

Nothing contained in this chapter shall be construed as authorizing the acquisition of any property for the national industrial reserve except from excess or surplus Government-owned property.

Sec. 459. Industrial Reserve Review Committee; composition, appointment, tenure, and compensation; law inapplicable

The Secretary of Defense shall appoint a National Industrial Reserve Review Committee, which shall consist of not exceeding fifteen persons to be appointed from civilian life who are by training and experience familiar with various fields of American industry, including shipbuilding, aircraft manufacture, machine tools, and arms and armament production. The members of such Committee shall serve for such term or terms as the Secretary of Defense may specify and shall meet at such times as may be specified by the Secretary of Defense to consult with and advise the Department of Defense. Each member of such Committee shall be entitled to compensation in the amount of $50 for each day, or part of day, he shall be in attendance at any regular called meeting of the Committee, together with reimbursement for all travel expenses incident to such attendance: *Provided,* That nothing contained in sections 281, 283, and 434 of Title 18, section 99 of Title 5; in last paragraph of section 119 of Title 41; or in any other provision of Federal law imposing restrictions, requirements, or penalties in relation to the employment of persons, the performance of services, or the payment or receipt of compensation in connection with any claim proceeding, or matter involving the United States, shall apply to such persons solely by reason of their appointment to and membership on such Committee.

Sec. 460. Duties of Committee; recommendations

It shall be the duty of the Committee appointed under section 459 of this title to review not less often than once each year the justification for the retention of property in the national industrial reserve established hereunder and (i) to recommend to the Secretary of Defense the disposition of any such property which in the opinion of the Committee would no longer be of sufficient strategic value to warrant its further retention for the production of war material in the event of a national emergency; (ii) to recommend to the Secretary of Defense standards of maintenance for the property held in the national industrial reserve; (iii) to review and recommend to the Secretary of Defense the disposal of that property which in the opinion of the Committee could and should be devoted to commercial use in the civilian economy; and (iv) to advise the Secretary of Defense with respect to such activities under this chapter as he may request.

Sec. 461. Reports to Congress

The Secretary of Defense shall submit to the Congress on April 1 of each year a report detailing the action taken by it under this chapter and containing such other pertinent information on the status of the national industrial reserve as will enable the Congress to evaluate its administration and the need for amendments and related legislation.

Sec. 462. Appropriations

There are authorized to be appropriated to the office of the Secretary of Defense and to the Administrator of General Services out of any moneys in the Treasury not otherwise appropriated, such sums as the Congress may, from time to time, determine to be necessary to enable the Secretary of Defense and the Administrator of General Services to carry out their respective functions under this Chapter.

APPENDIX B

LETTER OF INTENT FROM REGIONAL OFFICE
WAR ASSETS ADMINISTRATION
1000 GEARY STREET
SAN FRANCISCO, CALIFORNIA

May 27, 1949

In reply refer to:
RSF-C-PD
Moore Dry Dock Co. (West Yard)
(Fee-Owned Portion Only)
M-Calif-174

Oakland Dock and Warehouse Company
c/o Breed, Robinson and Stewart
Financial Center Building
Oakland, California

Attention: Mr. R. W. Van Deusen

Gentlemen:

This letter acknowledges the receipt of the 20% down payment of $240,300.00, as provided in our letter of award, April 11, 1949, to your corporation.

The 20% down payment having been made in accordance with the terms of the award, you are authorized to enter into and take possession of the premises, comprising the subject sale, upon your written acceptance and approval of the following terms and conditions:

1. The total purchase price is $1,201,500.00, of which the 20% down payment of $240,300.00 has heretofore been paid; the balance of $961,200.00 to be evidenced by your promissory note payable in equal annual installments of $48,060.00. The first annual payment shall be made on June 1, 1950, plus interest at the rate of 4% per annum on the unpaid balance, commencing June 1, 1949, also payable annually. Said promissory note to be secured by a purchase money deed of trust

and chattel mortgage covering the premises and personal property, subject of this sale.

2. Compliance with the requirements of WAA Regulation No. 5, including the amendments thereto.

3. It has been mutually agreed that you will take delivery of the premises and personal property subject to this sale effective 12:01 A.M., Pacific Standard Time, June 1, 1949, and you will accept accountability of the land, buildings, building installations and all personal property comprising this sale.

4. You will provide adequate insurance coverage in amounts and in companies to be approved by War Assets Administration Insurance Officer effective 12:01 A.M., June 1, 1949.

5. You will be responsible for and pay all taxes levied on the property, comprising subject sale, commencing June 1, 1949, and you will reimburse War Assets Administration on demand for any taxes paid by reason of said levy.

6. You will be responsible for and pay all public utilities pertaining to said premises commencing 12:01 A.M., Pacific Standard Time, June 1, 1949.

7. You will provide and be responsible for adequate guard service commencing 12:01 A.M., Pacific Standard Time, June 1, 1949, as may be required by our Property Management Division.

8. Title to be conveyed by quitclaim deed and bill of sale without warranty, express or implied, and you will execute a promissory note secured by a deed of trust and chattel mortgage.

(a) War Assets Administration does not furnish and will not pay for any policy of title insurance or any escrow fees or any portion thereof.

(b) You will pay for and attach to the deed any and all revenue stamps required by law.

(c) You will pay all recording fees involved in this transaction.

9. In the event the restrictions of the National Security Clause are removed from the personal property to be transferred, the Government will release the personal property from the lien of the chattel mortgage upon payment by purchaser of a toal amount not to exceed $366,660.00 to be applied against the unpaid balance of the total indebtedness in inverse order of maturity.

10. Any lease by you of the entire premises will be subject to prior written approval of War Assets Administration. All leases will be pledged to further secure said promissory note according to the terms of the deed of trust.

11. The award to you of the real and personal property comprising this sale is that which is described in the Invitation to Bid.

12. Clearance by the U. S. Department of Justice that the proposed disposal to your company is not in violation of the Anti-Trust Laws of the United States.

13. It is understood and agreed that in the event of failure to consummate the sale of these premises, you will vacate and surrender them to War Assets Administration in the same condition that they were accepted by you. In the event the sale is not consummated, the entire down payment of $240,300.00 will be returned to you without interest, provided the failure to consummate was not due to any fault of your firm. The Government will not be responsible or accountable for any costs or reimbursement.

14. Any other legal requirements deemed necessary or essential by the Office of Regional Counsel, War Assets Administration, San Francisco, California.

You will indicate your approval and acceptance of the foregoing terms and conditions in the space provided below on three copies hereof and return said three copies to this office, together with three executed copies of the resolution

of your Board of Directors authorizing the acceptance of this Letter of Intent.

Very truly yours,

Robert B. Bradford
Regional Director

Approved and Accepted
this 31st day of May, 1949

Oakland Dock and Warehouse Company

By Jules J. Agostini, Jr.
President

A. Hanford Morgan
Secretary

APPENDIX C

PUBLIC LAW 151—81ST CONGRESS
CHAPTER 288-1ST SESSION
H. R. 4754
TITLE 41 USCA, SECTIONS 201-274

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Sec. 233. Disposal of surplus property—Supervision and direction

(a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter.

Care and Handling

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

Method of Disposition

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

Valadity of Deed, Bill of Sale, Lease, Etc.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

Advertising as Prerequisite to Disposal

(e) Unless the Administrator shall determine that disposal by advertising will in a given case better protect the public interest, surplus property disposals may be made without regard to any provision of existing law for advertising until 12 o'clock noon, eastern standard time, December 31, 1950.

Contractor Inventories

(f) Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

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